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No. 90-1937

In The

Supreme Court of the United States

October Term, 1991

WILLIAM PATY, DIRECTOR, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII,

Petitioner,

v.

MERVIN NAPEAHI, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

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The Office of Hawaiian Affairs ("OHA") hereby respectfully moves this Honorable Court for leave to file an Amicus Brief in the Supreme Court of the United States in support of Respondent Mervin Napeahi, *Napeahi v. Paty,* Civil No. 85-1523-HMF. The interests of the Amicus Curiae are set out in the brief attached hereto. The Office of Hawaiian Affairs seeks leave to file this brief because the issues on appeal impact on all Native

Hawaiians and have an importance beyond the interests of the parties.

This Motion is made pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the memorandum attached hereto, and the records and pleadings filed herein.

The Office of Hawaiian Affairs, which seeks to submit an Amicus Curiae Brief, sought the consent of the parties; however, Petitioner Paty refused to give consent to file this Amicus Curiae Brief.

DATED: Honolulu, Hawaii, August 20, 1991.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. PRELIMINARY STATEMENT 1

II. INTEREST OF AMICUS CURIAE 2

III. ARGUMENT 9

A. This Case Is Not an Appropriate Vehicle to Address the Complicated Issues Raised by the Petitioner for a Writ of Certiorari Because They Were Not Raised or Briefed Below or Addressed by the Lower Courts 9

B. The Issues Raised by the Petition for a Writ of Certiorari Are of Central Concern to Amicus Curiae, and It Is Therefore Inappropriate to Address Them in a Case in Which Amicus Curiae Is Not Even a Party 10

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Page

Case Law

Liliuokalani v. United States, 45 Ct. Cl. 418, 435 (1910) 3

Napeahi v. Paty, 921 F.2d 897, 901 n.2 (9th Cir. 1990) 2

Statutes

Hawaii Revised Statutes, Chapter 10 8

Hawaii's Organic Act, Approved April 30, 1900. Act of April 30, 1900, Ch. 339, 31 Stat. 141 5

Hawaiian Homes Commission Act. Act of July 9, 1921, Pub. L. No. 34, Ch. 42, 42 Stat. 108 6

Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ..... 6, 7, 8

Joint Resolution To Provide For Annexing The Hawaiian Islands To The United States, Joint Newlands Resolution, J. Res. 55, July 5, 1898, Sec. 1, 30 Stat. 750 4

Hawaii State Constitution, Article XII, Sec. 4-6 .....3, 8

Hawaiian Island Constitution of 1894, art. 94, reprinted in the Fundamental Law of Hawaii 3 (L. Thurston ed., Honolulu: Hawaiian Gazette Co., Ltd., 1904) 3

Other

22 Op. Atty. Gen 574 (1899) 4, 5

Committee On Hawaiian Affairs Standing Comm. Rept. No. 59 and Committee of the Whole Rept. No. 13 7

J. Hobbs, *Hawaii: A Pageant of the Soil* 118 (1935) 4

President of the United States, Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. XIII (1893) 3

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BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

I. PRELIMINARY STATEMENT

The Office of Hawaiian Affairs (hereafter referred to as "OHA") respectfully submits this Amicus Curiae Brief in opposition to the Petition for a Writ of Certiorari in this case. The interests of the Amicus Curiae are set out below. Because OHA is the recipient (as trustee for native Hawaiians) of 20 percent of the income from the ceded lands trust, OHA opposes the action of the State of

Hawaii in this case because it diminishes the corpus of the ceded lands trust without resulting in any other type of benefit to native Hawaiians.

Furthermore, Amicus Curiae submits that this case presents a particularly inappropriate vehicle to address the complicated issues raised by the Petition for a Writ of Certiorari. The standing issues were not raised or briefed by either party at either the District Court or the Circuit Court level. *See Napeahi v. Paty*, 921 F.2d 897, 901 n.2 (9th Cir. 1990). Accordingly, OHA did not intervene in the lower courts as a party to protect its interests. Because these issues were not raised below, the opinion of the Court of Appeals for the Ninth Circuit makes only the most fleeting reference to them, *id.*, and thus does not provide this Honorable Court with its views on the range of questions raised by the Petition for a Writ of Certiorari.

Amicus Curiae submits that the Court of Appeals for the Ninth Circuit should be permitted to address the questions raised by the Petition for a Writ of Certiorari in appropriate subsequent cases, and that this Honorable Court should refrain from examining these questions until these issues are fully briefed by the interested parties (including OHA) and fully examined by the district and appellate courts.

II. INTEREST OF AMICUS CURIAE

Amicus Curiae is the Office of Hawaiian Affairs, the entity designated in the Hawaii State Constitution to represent the native people. The Trustees of the Office of Hawaiian Affairs are the duly elected representatives of

the Hawaiian people and are elected statewide by qualified voters who are of Hawaiian ancestry. The Trustees form a nine-member board and are elected for four-year staggered terms. (Hawaii State Constitution, Article XII, Sec. 5-6).

The establishment of the Office of Hawaiian Affairs was the culmination of several historical events. In January 1893, Westerners, primarily Americans, used arms to overthrow the lawful government of the Kingdom of Hawaii and its monarch, Queen Liliuokalani. The United States Minister in Hawaii ordered marines to be landed and recognized the new provisional government even before Queen Liliuokalani had surrendered. The Queen relinquished her government authority, but under formal protest to the United States. *See Liliuokalani v. United States*, 45 Ct. Cl. 418, 435 (1910).

The insurrectionists petitioned the United States for annexation of Hawaii by the United States but President Cleveland refused and found that " . . . [b]ut for the lawless occupation of Hawaii under false pretexts by the United States forces . . . the Queen and her government would never have yielded. . . . " President of the United States, Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. XIII (1893). The provisional government then proceeded to establish the Republic of Hawaii; to abolish the Kingdom of Hawaii, the Legislature, and the monarchy; and to expropriate all the Hawaii Government and Crown Land without compensation. Hawaiian Island Constitution of 1894, art. 94 reprinted in the Fundamental Law of Hawaii 3 (L. Thurston ed., Honolulu: Hawaiian Gazette Co., Ltd., 1904). (The reigning Monarch had held title to the Crown

Land and the Government had held title to the Government Land.)

In 1898, however, the United States did proceed to annex Hawaii. At the time of annexation, the Republic of Hawaii ceded approximately 1,750,000 acres of formerly Government and Crown Lands to the United States. J. Hobbs, *Hawaii: A Pageant of the Soil* 118 (1935). The Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States "cede[d] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining." Joint Resolution, J. Res. 55, July 5, 1898, Sec. 1, 30 Stat. 750. The Joint Resolution of Annexation stated that existing federal laws dealing with public lands would not be applicable to such lands in Hawaii but "Congress shall enact special laws for their management and disposition." *Id.*

Another section of the Joint Resolution of Annexation provided that:

> [A]ll revenues from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes. *Id.*

In an 1899 opinion, the United States Attorney General interpreted this language as subjecting the public lands in Hawaii to "a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the

Hawaiian Islands for educational and other purposes." 22 Op. Atty. Gen. 574 (1899).

The Joint Resolution was followed by Hawaii's Organic Act, approved April 30, 1900. Act of April 30, 1900, Ch. 339, 31 Stat. 141. The Organic Act established Hawaii's territorial government, confirmed the cession of Government and Crown Lands to the United States, and provided specific laws for the administration of public lands.

The Organic Act of 1900 provided that the Territory of Hawaii would retain control and management of these "ceded" lands, except for those lands "set aside" for the United States by either the Governor's or President's Executive order. Act of April 30, 1900, Ch. 339, 31 Stat. 141 (Sec. 91).

The Organic Act also provided that the proceeds from the territory's sale, lease, or other disposition of these ceded lands should be deposited in the territory's treasury for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation." *Id.*, Sec. 73(4)(c).

Although the Republic had ceded absolute title of the Crown and Government Lands to the United States, both the Joint Resolution of Annexation and the Organic Act recognized that these lands were impressed with a special trust under the federal government's proprietorship. Hawaii's ceded lands never became part of the federal public domain. Because of their unique status, the United States received legal title to the lands, while a beneficial interest remained with the inhabitants of Hawaii.

One recognition of the unique status of ceded lands, as well as the special relationship between the federal government and native Hawaiians, came in 1921 with the passage of the Hawaiian Homes Commission Act. Act of July 9, 1921, Pub. L. No. 34, Ch. 42, 42 Stat. 108. The Act withdrew approximately 188,000 acres of ceded lands and brought them under the jurisdiction of the Hawaiian Homes Commission to be leased to native Hawaiians at a nominal fee for 99 years. *Id.*, Sec. 203, 207, 208. A native Hawaiian was defined in the Act as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.*, Sec. 201(a)(7). Thus, only certain native peoples could qualify for ceded lands designated to be under the jurisdiction of the Hawaii Homes Commission. Congressional Records reflect that in 1920 Hawaii's Delegate to Congress advocated that there be no blood quantum. He also said that if one were required that the definitions of native Hawaiian should be based on a one-thirty-second blood quantum. Nevertheless, the arbitrary requirement of a 50% blood quantum was adopted by Congress.

When Hawaii was admitted to statehood in 1959, the federal government returned to the State of Hawaii ownership of all the ceded lands which were not set aside for its own use. Section 5(f) of the Admission Act mandated the State to hold ceded lands (excluding the land reserved under the Hawaiian Homes Commission Act) as a public trust for one or more of five purposes, including betterment of the conditions of native Hawaiians (as defined in the Hawaiian Homes Commission Act of 1920). Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. One portion of the special trust of the ceded

lands was thus specifically intended for native Hawaiians. Section 5(f) further provided that the use of the ceded lands, their proceeds and income for any purposes other than those enumerated "shall constitute a breach of trust for which suit may be brought by the United States." Thus, Section 5(f) in part can be viewed as a further safeguard to the continued existence of native Hawaiians and a further protection of their rights in native lands.

In 1978, the State of Hawaii held a Constitutional Convention. From 1893 until that time, persons of Hawaiian ancestry had been deprived of their original sovereignty and had not had their own government. In addition, neither the State of Hawaii nor its predecessor the Territory of Hawaii had implemented their ceded lands trust responsibilities, particularly with respect to the native Hawaiians.

The Delegates to the 1978 Constitutional Convention proposed a number of amendments to the Hawaii State Constitution to address these issues and the proposed amendments were adopted by a majority of the general public voters.

Until 1978, little attention had been focused on the trust language of section 5(f) of the Admission Act. At the 1978 Constitutional Convention, however, members of the Hawaiian Affairs Committee sought to implement the Admission Act's trust language as it relates to native Hawaiians. See, e.g., Constitutional Convention of 1978, Committee on Hawaiian Affairs Standing Comm. Rept. No. 59 and Committee of the Whole Rept. No. 13. As a

result, three new sections were added to what is now the Article XII of the fundamental law of the State of Hawaii.

Section 4 of Article XII now specifies that the lands granted to the state by Section 5(b) of the Admission Act (with the exception of the Hawaiian Homes Commission Act's lands) are to be held by the state as a public trust for native Hawaiians and the general public. Section 5 of Article XII establishes the Office of Hawaiian Affairs, to be governed by a nine-member elected board of trustees, which is to hold title to all real or personal property set aside or conveyed to it as a trust for persons of Hawaiian ancestry. Section 6 of Article XII sets forth the powers of the board of trustees and makes clear that the Office of Hawaiian Affairs is to hold in trust a pro rata portion of the income and proceeds derived from lands granted to the state by section 5(b) of the Admission Act.

The statutory purposes of the Office of Hawaiian Affairs include promoting the betterment of conditions of persons of Hawaiian ancestry; serving as the principal state agency for the performance, development, and coordination of programs and activities relating to Hawaiians; assessing the policies and practices of other agencies impacting on Hawaiians; conducting advocacy efforts; receiving, and disbursing grants and donations from all sources for Hawaiians; and, serving as a receptacle for reparations from the federal government. *See* Chapter 10, Hawaii Revised Statutes.

The Office of Hawaiian Affairs was established to serve all persons of Hawaiian ancestry. Thus, although the Office of Hawaiian Affairs' amendment names two beneficiaries of the OHA trust – native Hawaiians (those

with 50 percent or more aboriginal blood) and Hawaiians (those with any quantum of aboriginal blood) – the Office of Hawaiian Affairs at the present time is restricted to using its public land trust funds to benefit its native Hawaiian beneficiaries.

Securing a pro rata portion of the ceded land trust fund for native Hawaiians was a primary motive for establishing the Office of Hawaiian Affairs. Of equal importance, however, were the objectives of providing all persons of Hawaiian ancestry with the right to choose their leaders through the elective process and providing a vehicle for self-government and self-determination.

The Office of Hawaiian Affairs is a unique entity combining features of a public trust, government agency, and an independent entity with its own duly elected officials. The Office of Hawaiian Affairs is independent of the executive branch. Its independence is assured by its primary funding mechanism (the ceded land trust fund), its control over internal affairs, its ability to acquire and manage property, its power to enter into contracts and leases, and the elective process by which the Board of Trustees is chosen.

III. ARGUMENT

A. This Case Is Not an Appropriate Vehicle to Address the Complicated Issues Raised by the Petition for a Writ of Certiorari Because They Were Not Raised or Briefed Below or Addressed by the Lower Courts

The District Court in this case ruled that 1.75 acres of contested land on the Island of Hawaii (A) was not part

of the ceded lands trust because it was in private hands in 1898 and (B) would not have become part of the ceded lands trust even if it reverted back to the state through erosion. The Court of Appeals for the Ninth Circuit agreed that this land was in private hands in 1898, but reversed the District Court on its second holding, ruling instead that all private lands that revert back to the state because of natural phenomena such as erosion become part of the ceded lands trust. The case was thus remanded back to the District Court for a ruling on whether this land had reverted back to the state through erosion. 921 F.2d 897 (9th Cir. 1990).

The several highly complicated issues raised in the Petition for a Writ of Certiorari were not raised, briefed, or considered by the parties or the courts below. It is inappropriate for this Honorable Court to address them now, without the benefit of the guidance of the appellate court.

B. The Issues Raised by the Petition for a Writ of Certiorari Are of Central Concern to Amicus Curiae, and It Is Therefore Inappropriate to Address Them in a Case in Which Amicus Curiae Is Not Even a Party.

As discussed in Section II of this Brief, Amicus Curiae – the Office of Hawaiian Affairs – has a responsibility mandated by the Hawaii Constitution to protect the ceded public lands and the revenues they produce in order to preserve the resources for the native Hawaiian people. The issues raised by the Petition for a Writ of Certiorari are central to the ability of Amicus Curiae to

carry out this mission, and Amicus Curiae has a substantial interest in ensuring that these issues are considered and resolved in an appropriate fashion.

Because of the complexity of these issues, it is appropriate that they be considered carefully by the federal appellate court with primary responsibility for Hawaiian issues – the Court of Appeals for the Ninth Circuit – in cases that properly raise these issues with full briefing by all interested parties – including most specifically the Amicus Curiae Office of Hawaiian Affairs. Only after the Court of Appeals for the Ninth Circuit has provided its reasoned guidance should this Honorable Court finally address and resolve the issues raised.

The present case involves a straight-forward issue of Hawaiian land law which has been considered and properly resolved by the Court of Appeals for the Ninth Circuit, and the District Court should proceed to address the factual determination regarding whether the 1.75 acres had eroded after 1898. The complicated procedural issues are better addressed in later cases in which these issues are properly raised and briefed.

IV. CONCLUSION

For the reasons stated above, Amicus Curiae Office of Hawaiian Affairs believes that the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, August 20, 1991.

Respectfully submitted,

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